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No. 88-986

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RALPH RODNEY FIELDS,

Petitioner,

v.

JOSEPH T. DURHAM, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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35pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Parratt v. Taylor, 451 U.S. 527 (1981), and its progeny will bar a claim under 42 U.S.C., Section 1983 resulting from an alleged deprivation of rights by the highest officials of a state institution when a predeprivation hearing is practicable.

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* * * * * *

COUNTERSTATEMENT OF THE CASE

On June 27, 1986, after having received an unsatisfactory evaluation, Ralph Rodney Fields was recommended for termination from his position as Dean of Faculty and Provost at the Community College of Baltimore

by the College's newly appointed president, Joseph T. Durham. The Board of Trustees approved Petitioner's termination after a hearing held on August 12, 1986 at which the Petitioner was represented and afforded all of the requirements of due process.[1] Petitioner subsequently filed an amended complaint against Durham, the College, and its Trustees under 42 U.S.C., Section 1983. He alleged that he had been denied due process by Respondent's failure to follow the procedures required by the bylaws of the College and the terms of his employment agreement in connection with his discharge. The District Court granted Defendants' Motion for Summary Judgment on the Section 1983 claim and declined jurisdiction over the pendent state law claims. Petitioner appealed to the United States Court of Appeals for the Fourth Circuit.

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[1] In Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1497, 84 L.Ed. 2d 494 (1985), this Court found that the "root requirement" of

dants' Motion for Summary Judgment on the Section 1983 claim and declined jurisdiction over the pendent state law claims. Petitioner appealed to the United States Court of Appeals for the Fourth Circuit.

The Court of Appeals affirmed the District Court's decision holding that where the state deprives an individual of a property interest as the result of the unauthorized failure of its agents to follow state procedure, due process is satisfied by the availability of meaningful post deprivation process under Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer, 468 U.S. 517 (1984). Further, it held that the fact that highranking officials were involved in the alleged deprivation does not, by itself, make Parratt/Hudson inapplicable, citing Holloway v. Walker, 790 F. 2d 1170, 1173-74 (5th Cir. 1986), cert. denied, 107 S. Ct. 571 (1986).

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the Due Process clause to be "that the individual be given the opportunity for a hearing before he is deprived of any significant property interest" Boddie v. Connecticut, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971).... 105 S.Ct. at 1493.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Fourth Circuit is entirely consistent with applicable decisions of this Court. This Court has held that if an individual has been deprived of a property interest under color of state law, and the deprivation did not occur as a result of some established state procedure, the existence of an adequate state remedy to redress property damages inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment. See Parratt v. Taylor, 451 U.S. 527 (1981). Further, the logic of Parratt v. Taylor, applies equally to unauthorized intentional deprivations of property by state officials. See Hudson v. Palmer 468 U.S. 517 (1984). The Court of Appeals held that Petitioner did not argue

that he was not provided with a pretermination hearing, or that the termination procedures set forth in the conditions of his employment were not followed, or that the College's evaluation procedures, or its by-laws were constitutionally inadequate. Rather, he alleged that because he personally received inadequate notice, an untimely evaluation, insufficient information as to the reason for his termination, and the like, the process with which he was provided failed to conform with what was required by the College's rules and regulations as well as his employment agreement. The Court of Appeals held that the gravamen of all the claims asserted by the Petitioner, was that the Respondents deprived him of due process by failing to conform to their own established procedures and such claims placed the Petitioner squarely within the holding of Parratt. Therefore, the Court of Appeals held that the allegedly inadequate predepri-

vation proceedings do not violate due process merely because they were conducted under color of state law; they must also have been authorized by the State. Consistent with Parratt and Hudson, supra, and other decisions of the Supreme Court, and other Courts of Appeals, the Fourth Circuit Court of Appeals properly upheld the action of the District Court.

ARGUMENT

I.

THE PETITON FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE FEDERAL COURTS OF APPEALS HAVE CONSISTENTLY HELD IN CONFORMITY WITH DECISIONS OF THE SUPREME COURT, THAT WHEN THE RANDOM OR UNAUTHORIZED ACTIONS OF HIGHRANKING OFFICIALS WHICH DEPARTS FROM ESTABLISHED STATE PROCEDURES DEPRIVE AN INDIVIDUAL OF A PROPERTY INTEREST, DUE PROCESS IS SATISFIED BY THE AVAILABILITY OF MEANINGFUL POST DEPRIVATION PROCESS.

The only question which should properly be before this Court is whether or not the District Court erred when it deter-

mined that the Petitioner had not stated a claim under Section 1983. The District Court's determination was made based upon the Petitioner's own allegations that the Respondent acted arbitrarily by disregarding the established procedure which they were required to follow under State law concerning termination of Petitioner's employment.

Petitioner now asks this Court to consider another question, that is, whether or not Parratt and its progeny bars a claim under 42 U.S.C., Section 1983 resulting from a deprivation of rights by the highest officials of a state institution when a pre-deprivation hearing is practicable. Although this is a different questions from that presented by Petitioner at the Court below, the results must be the same, based upon the decisions in Parratt v. Taylor, and Hudson v. Palmer, supra.

Parratt v. Taylor, supra, stands for the proposition that:

> When deprivations of property are affected through random and unauthorized conduct of a state employee, predeprivation procedures are simply impracticable since the state cannot know when such deprivations will occur. Id. at 543.

No distinction was made between negligent or intentional deprivation, since the State cannot anticipate and control such acts in advance. Utilizing this reasoning, this Court further held that:

> An unauthorized intentional deprivation of property by a State employee does not constitute a violation of the procedural requirements of the Due Process Clause ...if a meaningful post-deprivation remedy for the loss is available. Ibid. See also Hudson v. Palmer, 468 U.S. 517 (1984).

The Court in Parratt[2] emphasized two important points. First, there must be a tortious loss of property as a result of a random and unauthorized act by a state employee. Secondly, the loss must be the result of some established state procedure.

If all of the Petitioner's allegations are taken as true, that is, that the Respondents failed to provide adequate notice and specification of the charges against him; failed to provide a hearing before an impartial decision maker; and failed to adhere to its own policies and procedures, the Petitioner still has not made out a claim under Section 1983. The fact remains that the Petitioner's complaint arose from the alleged inadequacies of the due process hearing which

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[2]Of course, Parratt was overruled to the extent that negligent deprivations of property without due process are no longer recognized as violations of the due process clause actionable under Section 1983 even if no post-deprivation remedies are available. See Daniels v. Williams, 106 S. Ct. 662 (1986).

the Respondents provided. Even if the Petitioner's assertions are taken as true, that the pretermination hearing was deficient, the State was not in a position to provide a predeprivation hearing at that juncture. In other words, the State did not and could not have learned of the deprivation until after it occurred. See Pratt v. McDougall, 773 F. 2d 1032 (9th Cir. 1985), at 1036. Nor could the State have authorized the Respondents' actions. The State could, however, provide post-deprivation remedies concerning the inadequacies of the pre-termination hearing by way of a tort or contract action.

Further, the Petitioner has yet to allege that the Respondents' actions were authorized by state law, still another requirement under Parratt. The Petitioner could not, and did not allege that the state system itself destroyed his property interests. He alleged only that the Respondents acted in contraventionof not only state

policy and procedure, but also in contravention of the College's own policy and procedure concerning due process requirements, prior to termination of his employment at the College.

In Hudson v. Palmer, 104 S. Ct. 3194 (1984), this Court expanded upon Parratt and found that...:

> The underlying rationale of Parratt is that when deprivations of property are effected through random and unauthorized conduct of a state employee, pre-deprivation procedures are simply "impracticable" since the state cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the "practicability" of affording pre-deprivation process is concerned. The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signaling his intent.... Accordingly, we hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of

> the Due Process Clause...if a meaningful post-deprivation remedy for the loss is available." Id. at 3203.

The result of the decision in Parratt and Hudson is that where an employee of the State allegedly participates in random and unauthorized acts that result in the deprivation of an individual's property interest, the only obligation of the State is to provide a meaningful post-deprivation remedy. A post deprivation judicial hearing can satisfy that obligation.

In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), this Court distinguished Parratt, noting Parratt was limited to situations where a random and unauthorized act of a state employee deprived an individual of a property interest. In contrast, the Logan decision dealt with a situation where the established state procedure itself caused an individual a deprivation of his/her property rights. Since Petitioner has not alleged that any of the State procedures, or

the College's procedures caused a deprivation, but has instead, alleged that a state employee deprived him of certain due process rights, which at best, according to Petitioner's facts, were random and unauthorized, Petitioner claims certainly fall squarely within the parameters of Parratt.

The Petitioner argues that the decision of Court below conflicts with the decisions of other Circuits. Those cases which appear to conflict with the Fourth Circuit contain facts which were not present in the Petitioner's case, or involve another type of interest, such as a liberty interest, which has been treated differently by this court than a property interest.[3]

The Petitioner cites Patterson v. Coughlin, 761 F. 2d 866 (2d Cir. 1985), in support of an argument that Parratt is not applicable. In Patterson, a prison inmate

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[3]See Parratt v. Taylor, 451 U.S. 527, 545 (1981) (Blackmun, J., and White, J., concurring).

was placed in isolation by state officials in violation of state law, and without being afforded a prior due process hearing. The Court held that based upon the Complaint, the deprivation of the inmate's liberty was neither random nor unauthorized so as to excuse, on the ground of impossibility, the State's failure to provide an adequate hearing before the decision to discipline the inmate was made. Id. at 887. Further, the Court specifically found that there was confusion between the concept of a deprivation of a liberty interest and the concept of a denial of the constitutional right to procedural safeguards. It reasoned that "the denial of a constitutionally sound pre-deprivation hearing is a separate and distinct injury from the loss of liberty." Id. at 892. The Court further found that:

> Although the denial of due process may have been unauthorized, the deprivation of liberty at issue here does not appear to have been unauthorized, as that term is meant by Parratt.... Unlike the deprivation of property that occurred in Parratt, here the

> responsible state officials who had the power to grant Appellant a hearing obviously knew that Appellant was in peril of being deprived of his liberty interest. In fact, he was given a hearing, albeit a deficient one. (emphasis added). Thus, the deprivation of liberty (emphasis added) was neither random nor unauthorized. Patterson at 892.

The Second Circuit recognized two issues: the deprivation of inmate's right to procedural due process, and the deprivation of his liberty interest. The procedural due process issue was resolved and cured under Parratt, but the deprivation of liberty issue was not addressed at all by the defendant officials or the District Court. Patterson's liberty interest was not addressed or resolved under Parratt because no attempt was made by the defendants in that case to provide a hearing prior to depriving him of his liberty interest. Parratt was further distinguished,

in that it only involved a property interest, as does the Petitioner's case. Patterson is therefore inapplicable.[4]

In Stana v. School Dist. of City of Pittsburgh, 775 F. 2d 122 (1985), the Court had before it two questions: Whether or not Stana was entitled to due process prior to having her name removed from an eligibility list for a teaching position; and assuming that she did, whether or not the defendants could have provided notice and an opportunity to be heard. Neither of these questions are presented to this Court in the present case.

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[4]Recently, the Second Circuit found in Marino v. Ameruso, 837 F. 2d. 45 (2nd Cir. 1988),that a city employee claiming denial of procedural due process...had a duty to prove inadequacy of state procedural remedies as an element of his procedural due process violation claim. Id. at 47. Additionally, the Second Circuit supports the prevailing thought amongst the other courts of appeal that if an individual has a "property right lost because of a random and unauthorized act by a State actor...the existence of an adequate post deprivation state remedy for the loss affords due process ..." Id. at 47, citing Hudson and Parratt.

The Respondents are not contending that Petitioner was not entitled to due process prior to his termination. Petitioner acknowledges that he was provided a hearing before the Board of Trustees on August 12, 1986, albeit allegedly deficient.

Stana, however, was not afforded a hearing, nor did the defendants in that case acknowledge that she was entitled to one. In this case, Petitioner was provided a predeprivation hearing, but was dissatisfied with it. The forum which must properly address that dissatisfaction must be the State judicial forum. That is, adequate post-deprivation remedies are available to Fields which comport with the requirements of Parratt and its progeny. Stachura v. Truszkowski, 763 F. 2d 211 (6th Cir. 1985), Rev'd on other grounds, 474 U.S. 918 (1986) and Schultz v. Baumgart, 738 F. 2d 231 (7th Cir. 1984),[5] both stand for the same proposition

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[5] In Wilson v. The Civil Town of Clayton Indiana, 839 F.2d 375 (7th Cir. 1988), Plaintiff business owner filed a Section 1983 to recover

and present the same issues as Stana, and are therefore distinguishable from Petitioner's case.

Petitioner further cites a line of cases which stand for the proposition that where a pre-termination due process hearing was practical and feasible, post-deprivation remedies are inadequate. See Littlefield v. City of Alton, 785 F. 2d 596 (8th Cir. 1986); Westborough Mall, Inc.v. City of Cape Girar-

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damages based on eviction of employees and customers from his place of business. The Court found that:

> "Under Parratt, when deprivations of property are effected through random and unauthorized action of state employees and the state provides an adequate post-deprivation remedy, the requirements of due process are satisfied, and Plaintiff may not maintain a Section 1983 suit in Federal Court."

Parratt, 451 U.S. at 543. That Court found that since Plaintiff had available, through the Indiana Tort Claims Act (citation omitted), post deprivation process for his claim, the "state remedy was 'adequate' to satisfy the standard of Parratt. See also Hossman v. Spradlin, 812 F. 2d 1019 (7th Cir. 1987)."

deau, 794 F. 2d 330 (8th Cir. 1986), cert. den. 107 S. Ct. 1373 (1987); Fetner v. City of Roanoke, 813 F. 2d 183 (11th Cir. 1987).[6]

As previously stated, this argument falls short of the fact that the Petitioner was provided a hearing prior to termination, and was dissatisfied with that process. If the process was deficient, the acts were at best, random and unauthorized, not sanctioned by State law or procedure, but could, however, be cured by adequate post-deprivation remedies.

The Petitioner also cites cases which involved deliberate considered acts of State officials, (and in one case, a conspiracy), designed to deprive plaintiff of his

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[6] But see Goolsby v. City of Montgomery, 805 F. 2d 1008 (11th Cir. 1986), wherein the 11th Circuit found in applying Parratt in an employment termination situation that:

> "The legacy of Parratt and its progeny is that such unauthorized conduct...can be cured by various post deprivation remedies which can be provided by the State. This conclusion has been embraced in the Circuit by Lewis v. Hillsborough Transit Authority, 726 F. 2d 668, 669 (11th Cir. 1984)." Id. at 1011.

rights, under the apparent authority of state law. See Piatt v. MacDougall, 773 F. 2d 1032 (9th Cir. 1985), and Bretz v. Kelman, 773 F. 2d 1026 (9th Cir. 1985).[7] In both cases the Courts found that such acts could not be considered random, nor could the State provide a meaningful post-deprivation remedy since it was the State process itself which was abused.

Both cases can be distinguished from Petitioner's, in that no matter how one reads Petitioner's Complaint, there is no allegation that the Respondents used state procedure or law, to deprive him of his due process rights. As pointed out by the lower Court, Petitioner alleged the opposite, that

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[7] But see Lake Nacimiento Ranch Co. v. San Luis Obispo County, 841 F. 2d 872 (9th Circuit 1987) wherein the 9th Circuit found that the availability of adequate state remedies defeated a procedural due process claim, relying on Parratt.

the Respondents disregarded the established state procedures they were required to follow under state law.

Finally, the Petitioner cites Salisbury v. Housing Authority of Newport, 615 F. Supp. 1433 (E.D. Ky 1985), as being supportive and similar to his case. In Salisbury, the plaintiff essentially alleged that while her pre-termination hearing contained "all of the outward indicia of due process," Id. at 1438, she was denied due process because the Housing Authority which ultimately terminated her was biased. The Court in that case spent a considerable amount of time discussing whether or not the Housing Authority was, in fact, biased, and found that it was, primarily because the Housing Authority itself would have been implicated in improprieties had the plaintiff been vindicated. Although Petitioner herein alleged in his amended Complaint that the Board of Trustees was not an impartial

tribunal, he has not made any allegations which could support a finding of "disqualifying personal bias," as defined by the Court in Salisbury, which would have denied him an impartial tribunal.[8]

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8 See Schaper v. City of Huntsville, 813 F. 2d 709 (5th Cir. 1987) where that Court found that due process does not require the State to provide an impartial decisionmaker at a pretermination hearing, relying on Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (1974), wherein this Court debated whether or not an impartial decisionmaker at the pretermination stage was required. Justice White concurred in part and dissented in part explaining that...:

> Fairness and accuracy are not always treated simply because the leading examiner is the supervisor of an employee.... But there the hearing official was the object of slander that was the basis for the employee's proposed discharge. In ruling that the employee was to be terminated, the hearing examiner's own reputation ...was at stake. 416 U.S. at 199, 94 S. Ct. at 1666.

In a plurality decision, Chief Justice Burger, and Justices Rehnquist and Stewart, and Justices Powell and Blackmun concurring found that due process does not require an impartial hearing officer at the pretermination stage.

Further, in a brief footnote, the Court distinguished Parratt from Salisbury by simply stating that because the Housing Authority had the opportunity to anticipate and control the proceedings, it was not a case of random, unauthorized conduct where a pre-deprivation hearing was impracticable or impossible under Parratt. The Court, however, reached its conclusion in the limited context of the defendants' unwillingness to provide an impartial tribunal since they themselves had so much at stake. Salisbury, both prior to and during the hearing, consistently demanded an impartial tribunal, (Salisbury at 1436). Her protests were ignored. Similar demands to those made in Salisbury were not made by Petitioner, and Petitioner's Complaint does not center upon the issue of impartiality. Salisbury can at best only be instructive in the law dealing with proving impartiality, and is therefore distinguished from Petitioner's case.

In summary, the decisions of the Second, Third, and Eighth Circuits take the position that when there is a violation of State law by highranking officials, it is not random and unauthorized if carried out pursuant to a practice or policy established by that body. Thus, even if Petitioner's argument that Respondents actions could not be random and unauthorized by virtue of their rank was successful, Petitioner has not alleged that Respondents acted in accordance with some policy or practice established at their institution.

This Court held that state post-deprivation judicial process could satisfy a due process requirement when the taking is caused by a "random and unauthorized act," as opposed to the enforcement of an "established state procedure". The next query is what process is due, and whether or not there are available state judicial remedies which may satisfy the process due. Finally, once the

Court finds that the State remedies can satisfy the due process requirements, the Respondents must prevail on the merits, because the Petitioner has failed to make out a claim under Section 1983.

II. ABSENT A CLAIM UNDER 42 U.S.C., SECTION 1983, THE PROPER FORUM FOR THE PETITIONER'S CASE IS THE STATE COURT.

Case law emanating from other jurisdictions are in accord with the Court below in the application of the Parratt and Hudson doctrine.

In Vicory v. Walton, 721 F. 2d 1062 (6th Cir. 1983), it was held that:

> The reasoning of Parratt appears to extend at least to all Section 1983 cases claiming a procedural due process injury to a property interest without regard to whether, at common law, a plaintiff would have sued in tort or contract.... Policy considerations do not require a federal hearing in procedural due process cases that can be corrected in state court.

This reasoning is in keeping with the lower Court's determination that Petitioner's remedies should properly be sought

in state court, particularly because the majority of his claims are pendent, and the gravamen of his constitutional claim involves procedural due process violations, therefore bringing Petitioner directly in line with Parratt.

In Holloway v. Walker, 790 F. 2d 1170 (5th Cir. 1986), cert. denied 107 S. Ct. 571 (1986), the Court specifically attacked the reasoning ennunciated in several of the cases cited by Petitioner in the present case. It found that it could not agree with the reasoning in Bretz v. Kelmon, 773 F. 2d 1026 (9th Cir. 1985), wherein the plaintiff alleged that the police, prosecutors, and others conspired to prosecute him. The Bretz Court found Parratt and Hudson were inapplicable because they applied only to minor deprivations of liberty or property; that a conspiracy cannot be "random," and that Logan

instead of Parratt was controlling. The Holloway Court disagreed, and specifically found that:

> Nothing in Parratt or Hudson suggests that the holdings of these cases are confined to minor deprivations of liberty or property. If the Supreme Court intended these cases to announce a constitutional rule of lex non curat de minimis, it would have said so. (citation ommitted).... The Ninth Circuit's conclusion that a conspiracy cannot be a random act is also unpersuasive. From the point of view of the state, a conspiracy among its employees can indeed be a random act if the state cannot anticipate and control such conduct in advance (citation omitted) ...the effect of the Ninth Circuit holding is to revive the intentional/negligent act distinction, rejected in Hudson, in another form.... Finally, we decline to follow the view of the Ninth Circuit that Logan extends to an illegal conspiracy case.... Logan was deprived of due process not because the Commission illegally delayed in acting on his claim but because the estalished state procedure failed to provide Logan with a remedy.... By contrast in Bretz, the plaintiffs had adequate appellate remedies to correct the deprivations caused by the illegal acts of the conspiring parties.... Holloway at 1172.

Petitioner's arguments concerning the misapplication of state procedure, the involvement of the highest ranking officials at the College in the misapplication, and the alleged intentional abuse of the process by these officials, do not exempt him from the Parratt/Hudson doctrine, and are not supported by the authorities cited.

In 1986, the City of Charlotte allegedly demolished Plaintiff's house without prior notice, as required by the due process clause of the Fourteenth Amendment, Yates v. Jamison, 782 F. 2d 1182 (4th Cir. 1986). In that case, the Fourth Circuit noted that the Plaintiff was in fact entitled to a hearing and that a hearing was practicable. However, since Plaintiffs did not challenge the operation of the State or local law concerning condemnations, Plaintiff's complaint was dismissed because "they possess[ed] an adequate and meaningful post

deprivation remedy in the form of an action for inverse condemnation in State Court." Yates, 782 F. 2d at 1185.

Similarly, Petitioner has at his disposal several avenues which he may pursue in state Court if he feels aggrieved by the actions taken by Respondents in the case at Bar regarding his termination.

It is clear that the Fourth Circuit has been consistent in its decisions regarding the application of Parratt and Hudson that if Petitioner is not contesting the state or local laws, or institutional policies themselves, but instead,has contested a state official's action which allegedly fall outside of the confines of those laws, policies, or procedures, then clearly Petitioner has not made out a claim under 42 U.S.C., Section 1983.

CONCLUSION

For the reasons stated above, Respondents respectfully submit that the decision of the Fourth Circuit does not conflict with the decisions of other federal courts of appeals on the same matter and respectfully urge this Court to deny the present petition.

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